Supreme Court, U.S.
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No. 85-596

In the Supreme Court

of the United States

OCTOBER TERM, 1985

ROBERT L. ARNSBERG,
Petitioner,

v.

UNITED STATES OF AMERICA,
MICHAEL J. MANEY, and NORMAN E. WEILER,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF THE PETITIONER

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REPLY OF THE PETITIONER

ARGUMENT IN REPLY

1.

The importance and timeliness of the immunity and summary judgment issues raised here was recently underscored in, Note, Qualified Immunity of Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation, 95 Yale L. J. 126 (Nov. 1985). The author of this note anticipated the nature of the problem presented in this case:

> A literal application of Harlow [v. Fitzgerald, 457 U.S. 800 (1982)] thus permits an official to be granted qualified immunity as a matter of law even though the principal disputed question of fact in the case--the true purpose or intent motivating the official's conduct--remains unresolved. More accurately, the principal disputed question of fact, which forms the basis of the substantive claim, is subsummed by the legal immunity inquiry and implicitly resolved by the Court against the plaintiff when it concludes, on the basis of nothing more than the official's pretextual assertions, that the allegedly unconstitutional conduct controvened no clearly established law. Id., 138.

Contrary to Respondents' Brief at page 8, we do not assert that the Court below "misunderstood the factual record." We assert that the Court improperly found there was no genuine issue as to any material fact. To reach this erroneous conclusion, the Court improperly made findings which resolved in material factual issues in favor of respondents. Our point is that it is not the business of Courts of Appeals to make findings of fact. The task of the Court below

was to determine whether a genuine issue of material fact existed.

Any argument on this question must necessarily be "fact bound" in a sense (Respondents' Brief, page 8), but the facts are cited to show the existance of a genuine material issue, not to persuade this Court that petitioner's interpretation of the facts is correct. Petitioner seeks to have these issues tried in the proper forum.

Although the questions involving Rule 56, Federal Rules of Civil Procedure alone may no longer present issues which this Court should review, this case involves much more. The factual problem here is whether, under Harlow v. Fitzgerald, 457 U.S. 800 (1982), summary judgment was desirable. This inquiry involves not only the more familiar summary judgment issues, but also the evolution of the Harlow objective standard of good faith immunity.

This Court has repeatedly said that summary judgment should be used to protect government agents from frivolous claims. E.g., 457 U.S. at 8-819. Nevertheless, this Court and the Congress have both held that where the claim is not frivolous, a citizen whose Fourth Amendment rights are violated has a remedy under 28 U.S.C. §2680(h) or Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) or both. The balance of those two important interests (the protection of government agents from frivolous claims and the protection of citizen's Fourth Amendment rights) is at the center of the Harlow standard. The scope of the protection of government agents by the use of summary judgment is at the center of this case.

The relative completeness of the record in this case and the strength of the competing interests on both sides in this case (the clearly erroneous arrest of an innocent citizen versus the need to protect the agents from harassing

litigation) make this a good opportunity to further refine Harlow immunity standard, particularly where it conflicts with Rule 56 of the Federal Rules of Civil Procedure. See, 95 Yale Law Journal at 140.

One issue of material fact in our case is this: Respondents' claim that the erroneous arrest was the result solely of a mistake of the United State Magistrate (who is absolutely immune) in finding probable cause where there was none. Petitioner claims that the agents themselves acted wrongfully in at least two ways. First, in misleading the Assistant United States Attorney and the Magistrate and then in acting on a warrant which they knew, or should, by their training, have known, was improper and not supported by probable cause.

Petitioner's interpretation of the facts is supported, if not compelled, by these uncontroverted facts:

1. The same agents who tried and failed to serve Arnsberg with the subpoena also arrested Arnsberg with the warrant isued for "failure to appear."

2. The agents were trained and experienced in serving subpoenas.

3. The agents were trained and experienced in making arrests.

4. The agents' job description and the law required them to know the law governing their conduct.

Respondents' interpretation of the facts, we suppose, will be supported by testimony that the agents relied on the Assistant United States Attorney and the Magistrate in executing the warrant. However, that subjective testimony is lacking in credibility when confronted by the hard facts. A genuine issue of material fact exists.

Perhaps it would be possible for a trier of fact to find that the agents did not act tortously. Certainly, it was not proper for that

determination to be made by way of summary judgment.

Surely, this Court must not have intended Harlow to negate the requirements of Rule 56 of the Federal Rules of Civil Procedure.

2.

A final point in reply is that, while respondents do not find a conflict between Brown v. United States, 653 F2d 196 (5th Cir. 1981) and Norton v. United States, 581 F2d 390 (4th Cir. 1978) (Respondent's Brief at p. 14). The Courts do include the Ninth Circuit Court of Appeals below. E.g., Arnsberg v. United States, 757 F2d 971, 976n2, 978n4 (9th Cir. 1984). This Court should resolve that conflict.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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